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9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 TERRY LYNN HAWKINS

12 Petitioner,

13 vs.

14 MATTHEW CATE, Secretary of CDCR,

15 Respondent.

Civil No. 08cv678 J (PCL)

**REPORT AND RECOMMENDATION RE  
MOTION TO DISMISS PETITION FOR  
WRIT OF HABEAS CORPUS**

16  
17 **I. INTRODUCTION**

18 On April 14, 2008, Petitioner, proceeding pro se, submitted a Petition for Writ of Habeas Corpus  
19 pursuant to 28 U.S.C. § 2254 challenging his conviction of robbery with a gun in San Diego Superior  
20 case number SCD 162762. (Doc. 1.) Respondent filed both an answer to the petition and a motion to  
21 dismiss, arguing that it was filed beyond the statute of limitations. (Doc. 16.)

22 The Court has considered the Petition, Respondent's answer and motion to dismiss, Petitioner's  
23 reply and traverse (doc. 24), the lodgments submitted by Respondent, and all the supporting documents  
24 submitted by the parties. Based upon the documents and evidence presented in this case, and for the  
25 reasons set forth below, the Court recommends that the motion to dismiss be **GRANTED** and that the  
26 Petition be **DISMISSED** with prejudice.

27 **II. PROCEDURAL BACKGROUND**

28 Petitioner was convicted in 2003 of robbery, assault with a semiautomatic firearm, burglary, and

1 possession of a weapon by a felon. (Lodgment 6 at 1-2.) He appealed his conviction to the California  
 2 Court of Appeal. The court upheld the conviction in an unpublished, written opinion filed on April 14,  
 3 2005. (Lodgment 6.) Petitioner then filed a Petition for Review in the California Supreme Court,  
 4 which denied the petition on June 29, 2005. (Lodgment 8.)

5 Petitioner attempted to file his first post-conviction petition for writ of habeas corpus in the San  
 6 Diego Superior Court on June 13, 2006. (Lodgment 10, at 1.) After inquiring into the status of his  
 7 petition eight months later, the court operations clerk, in a letter dated February 22, 2007, advised him  
 8 that he had sent his petition to the wrong location and invited him to file the petition in the North County  
 9 Division. (Lodgment 10, Exhibit D.) On April 5, 2007, Petitioner properly filed his first state court  
 10 habeas petition.<sup>1</sup> (Lodgment 9.) The superior court denied the petition in a written opinion on May 18,  
 11 2007. (Lodgment 11.) On July 18, 2007, Petitioner appealed the denial in the court of appeal (lodgment  
 12 12), which denied the appeal on August 6, 2007 (lodgment 13).

13 On September 20, 2007, Petitioner filed in the court of appeal another state habeas corpus  
 14 petition that raised additional claims, which was denied on August 6, 2007. (Lodgments 12 and 13.)  
 15 Petitioner then appealed the decision in the California Supreme Court, which also denied the petition  
 16 on March 26, 2008. (Lodgments 14 and 15.)

17 Finally, Petitioner filed the instant Petition before this Court on April 14, 2008. (Doc. 1.)  
 18 Respondent has filed both an answer to the petition and a motion to dismiss, arguing that it was filed  
 19 beyond the statute of limitations. (Doc. 16.) Petitioner traversed Respondent's response on January 29,  
 20 2009. (Doc. 24.)

### 21 **III. DISCUSSION**

22 Under 28 U.S.C. § 2244(d), Petitioner has one year from the date his conviction is final to file  
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 26 <sup>1</sup> For purposes of calculating AEDPA's limitation period the "mailbox rule" applies to both the pro se  
 27 prisoner's federal habeas petition and the state court habeas petition that began the period of tolling. See Anthony  
 28 v. Cambra, 236 F.3d 568, 575 (9th Cir. 2000) (applying Houston v. Lack, 487 U.S. 266, 276 (1988), in which  
 the Supreme Court held that a notice of appeal by a pro se prisoner is deemed filed at the moment the prisoner  
 delivers it to prison authorities for forwarding to the clerk of court); see also Huizar v. Carey, 273 F.3d 1220 (9th  
 Cir. 2001)(holding that mailbox rule applies even if document is never actually filed as long as prisoner diligently  
 follows up once he has failed to receive a disposition from the court).

1 a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254.<sup>2</sup> See 28 U.S.C. §  
 2 2244(d)(1). Petitioner’s petition for review was denied by the California Supreme Court on June 29,  
 3 2005. (Lodgment 8.) Thus, including the ninety days within which Petitioner could have pursued his  
 4 appeal in the United States Supreme Court by filing a petition for writ of certiorari, see Bowen v. Roe,  
 5 188 F.3d 1157, 1158-59 (9th Cir. 1999), his conviction became final on September 27, 2005. Petitioner  
 6 had until September 27, 2006 to file his federal habeas petition absent statutory or equitable tolling. 28  
 7 U.S.C. § 2244(d); Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997),  
 8 overruled on other grounds by Calderon v. United States Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir.  
 9 1998). As Petitioner filed his federal habeas petition on April 14, 2008, he would need to account for  
 10 the more than 18-month delay in filing to avoid dismissal of his petition. As demonstrated below,  
 11 Petitioner is not entitled to statutory or equitable tolling, and his Petition, barred by the statute of  
 12 limitations, should be dismissed with prejudice.

#### 13 **A. Statutory Tolling**

14 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a properly filed application for  
 15 State post-conviction or other collateral review . . . is pending shall not be counted toward any period  
 16 of limitation under this subsection.” 28 U.S.C. § 2244(d)(2). A state petition is “properly filed,” and  
 17 qualifies for statutory tolling, only if “its delivery and acceptance are in compliance with the applicable  
 18 laws and rules governing filings.” Artuz v. Bennett, 531 U.S. 4, 8 (2000). These rules include “the  
 19 court and office in which it must be lodged.” Id. San Diego Superior Court Rule 3.3.2.A.1 provides  
 20 that a “petition for writ of habeas corpus should be filed in the criminal records division of the court that  
 21 serves the area in which the underlying criminal case was or is pending.” Improperly filed and lodged  
 22 state habeas petitions are not entitled to statutory tolling. Hood v. Galaza, 47 F. Supp. 2d 1144, 1147  
 23 (S.D. Cal. 1999). Moreover, “section 2244(d) does not permit the reinitiation of the limitations period  
 24 that has ended before the state petition was filed.” Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.  
 25 2003).

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26  
 27 <sup>2</sup> The statute of limitations begins to run ninety days following finality unless one of three  
 28 exceptions apply. 18 U.S.C. § 2244(d)(1)(A-D). None of the exceptions apply to Petitioner: he does  
 not claim that there was a state impediment to his seeking further relief; his claims do not rely on any  
 new constitutional right determined by the U.S. Supreme Court to be retroactive; and he does not claim  
 that any of his claims were discovered at a later date.

1 In this case, Petitioner claims that he should be entitled to tolling for a state habeas petition filed  
 2 in June 2006. However, as this petition was sent to and improperly lodged in the wrong location, it  
 3 cannot have tolling effect under the federal statute. Petitioner properly filed his first state habeas  
 4 petition in April 2007. By this time, the statute of limitations period, which began on September 27,  
 5 2005 and ended on September 27, 2006, had expired. Petitioner's April 2007 petition, and those that  
 6 were filed thereafter, cannot be given tolling effect because the federal statute does not permit the  
 7 reinitiation of the limitations period that has ended before the first state petition was properly filed.  
 8 Thus, Petitioner cannot account for the delay in filing his federal habeas petition with the statutory  
 9 tolling provision. His federal petition can be timely if he is eligible for sufficient equitable tolling to  
 10 make his April 14, 2008 federal habeas petition timely.

#### 11 **B. Equitable tolling**

12 "To be entitled to equitable tolling, [Petitioner] must show '(1) that he has been pursuing his  
 13 rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely  
 14 filing." Lawrence v. Florida, 549 U.S. 327, 335 (2007) (quoting Pace v. DiGuglielmo, 544 U.S. 408,  
 15 418 (2005)). Equitable tolling is unavailable in most cases, and "the threshold necessary to trigger  
 16 equitable tolling is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063,  
 17 1066 (9th Cir. 2002).

18 Although Petitioner has not explicitly requested equitable tolling, the Court reads the submitted  
 19 papers as an implicit request for such. Petitioner did attempt to file a state habeas petition before the  
 20 limitations period expired, albeit in the wrong court. However, when Petitioner attempted to file the  
 21 June 2006 petition, almost nine months of the limitations period had elapsed. Petitioner took no action  
 22 until February 2007, eight months after sending the state petition to the wrong court. These delays  
 23 demonstrate a lack of diligence, so as to preclude equitable tolling. As for the second prong, Petitioner  
 24 has not demonstrated that extraordinary circumstances stood in his way preventing a timely filing.  
 25 Thus, Petitioner cannot rely on equitable tolling to excuse his delay in filing his federal habeas petition.

#### 26 **IV. CONCLUSION AND RECOMMENDATION**

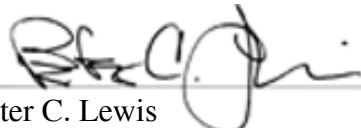
27 For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the Court issue an  
 28 Order: (1) approving and adopting this Report and Recommendation, and (2) directing that Judgment

1 be entered granting the motion to dismiss and dismissing the Petition with prejudice. The Court submits  
2 this Report and Recommendation to United States Chief District Judge Napoleon Jones under 28 U.S.C.  
3 § 636(b)(1) and Local Civil Rule 72.1(c)(1)(c) of the United States District Court for the Southern  
4 District of California.

5 **IT IS ORDERED** that no later than **March 6, 2009**, any party to this action may file written  
6 objections with the Court and serve a copy on all parties. The document should be captioned  
7 "Objections to Report and Recommendation."

8 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court and  
9 served on all parties no later than **March 20, 2009**. The parties are advised that failure to file objections  
10 within the specified time may waive the right to raise those objections on appeal of the Court's order.  
11 See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156 (9th  
12 Cir. 1991).

13 DATED: February 10, 2009

14   
15 Peter C. Lewis  
16 U.S. Magistrate Judge  
17 United States District Court

18 cc: The Honorable Jones  
19 All Counsel of Record  
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